UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, as Next Friend Of A.C., a minor, And Justin Ho-Wee Wong Plaintiffs, v. Virgin Mobile Pty Ltd. Defendant.	§ § § § § § § § § § § § §	CAUSE NO. 3:07-CV-01767

PLAINTIFFS' REPLY TO DEFENDANT'S MOTION IN OPPOSITION TO PLAINTIFFS' MOTION FOR EXTENSION

Plaintiffs, Susan Chang, as next friend of A.C., a minor, and Justin Ho-Wee Wong ("Plaintiffs") file this reply to Defendant's motion in opposition to Plaintiffs' motion for extension, respectfully requesting that the Court provide Plaintiff with a forty-five day extension to respond to Defendant's motion to dismiss.

I.

FACTUAL BACKGROUND

Plaintiffs commenced jurisdiction discovery on January 18—soon after obtaining their first extension from the Court—by serving Defendant with their first set of interrogatories and request for admission. Rather than responding with information responsive to the requests, Defendant asserted boilerplate objections to 18 of Plaintiffs' 25 interrogatories and 41 of their 52 request for admission. The few responses that it did provide were nonresponsive, devoid of jurisdictional relevance, and patently inconsistent with the acclamations presented in its motion to dismiss and supporting affidavit.

In an attempt to amicably resolve the issue, Plaintiffs requested that Defendant supplement its responses. Rather than do so, however, Defendant persisted on orally communicating to Plaintiffs the answers that its corporate representatives would provide at the deposition (many of which, ironically, were directly responsive to the written discovery requests in dispute). Left with no other option, Plaintiffs filed a second motion for extension so that they could obtain the jurisdictionally relevant information through a motion to compel. Defendant agreed to supplement a number of its deficient responses several weeks later after conferencing with Plaintiffs and reviewing their 20 page draft motion to compel. Nonetheless, Plaintiffs have still not received Defendant's supplemental responses to their request for admission. [1]

II.

INTRODUCTION

On May 8, 2008, Plaintiffs subpoenaed Yahoo!, Inc., Flickr's parent company, to provide records identifying the location of the server where the picture of Alison Chang was stored. According to Yahoo!'s Senior Compliance Paralegal, it will take Yahoo! approximately thirty to forty days to respond to the subpoena from the date of service. Because Plaintiffs' response is due on June 9, Plaintiffs requested an additional forty-five days to respond to Defendant's motion to dismiss. Defendant's, however, opposed the request, contenting—with little if any support—that the location of Yahoo!'s servers is irrelevant. This argument, as demonstrated in more detail below, is clearly without merit.

[1] Although it agreed to produce the information by April 28, Defendant, to this day, has failed to produce its supplemental responses to Plaintiffs' request for admission.

III.

ARGUMENT AND AUTHORITIES

1. The Location of Yahoo!'s Servers is Relevant to Personal Jurisdiction

Defendant's reply rests on two false postulates: (1) the location of server "serves no basis whatsoever to create personal jurisdiction; and (2) its contacts must have damaged or interrupted the operation of Yahoo!'s servers for it to be subject to specific jurisdiction based on those contacts.

The first is belied by the Fort Worth Court of Appeals' recent decision in *TravelJungle v. American Airlines*.[2] The court—in what appears to be the first published opinion in Texas to address the jurisdictional effect of electronic contacts with computer servers—upheld the exercise of personal jurisdiction over a German travel company based solely on its unauthorized use of and contact with American's servers.[3] Attempting to distinguish the opinion, Defendant vacuously contends that "specific jurisdiction is conferred via server location *only* when the alleged harm being claimed in the complaint is directed towards the server."[4] This argument, however, both ignores a fundamental requirement for establishing specific jurisdiction, and conflicts with this and other courts' decisions finding specific jurisdiction over nonresident defendants based on their internet activities.[5]

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[2] *TravelJungle v. Am. Airlines, Inc.*, 212 S.W.3d 841 (Tex. App.—Fort Worth 2006, no pet.).

[3] *TravelJungle*, 212 S.W.3d at 846-47.

[4] Defendant's Opposition to Plaintiffs' Motion for Third Extension, at 4 (emphasis added).

[5] *First Fitness Int'l, Inc. v. Thomas*, 533 F.Supp.2d 651, 656 (N.D. Tex. 2008) ("Courts in this District have repeatedly held that '[t]he exercise of [specific] personal jurisdiction over an individual for his Internet activities . . . is proper when a defendant intentionally directs his tortuous activities towards the forum state.'"); *Carrott Bunch Co v. Computer Friends, Inc.*, 218 F.Supp.2d 820, 826 (N.D. Tex. 2002) (same); *see also CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (exercising specific

For example, In *Internet Doorway v. Parks*, the plaintiff filed suit against a Texas resident for sending unsolicited emails to people "all over the world, including Mississippi residents, advertising a pornographic web-site."[6] The plaintiff claimed that the email, which had been falsified to make it appear that it was being sent from his email address, jeopardized his goodwill in the community, and required him to devote substantial time and resources in responding to numerous complaints from the people who had received it.[7] Although it was not damaged by the emails, the court emphasized that the plaintiff's server was accessed when a recipient viewed the email.[8] Relying on this fact, the court concluded that the Plaintiff's claims arose from defendant's contacts with the server, and denied the defendant's motion to dismiss for lack of personal jurisdiction.[9]

It is evident, upon applying these same principles here, that Defendant's contacts with Yahoo!'s servers are distinctly relevant to personal jurisdiction. The determinative inquiry, when examining specific jurisdiction, is whether Plaintiffs' claims arise from or relate to these

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jurisdiction over nonresident defendant in state where computer network that processed defendant's computer software sales was located); *D.C. Micro Dev., Inc. v. Lange*, 246 F.Supp.2d 705, 710-12 (W.D. Ky. 2003) (finding specific jurisdiction over defendant who accessed plaintiff's server to misappropriate proprietary information); *Verizon Online Serv., Inc. v. Ralsky*, 203 F.Supp.2d 601, 619-21 (E.D. Va. 2002) (holding that defendant who sent spam emails to unknown recipients was subject to personal jurisdiction in Virginia because some of the emails were received by Verizon customers and processed on Verizon's servers); *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773, 776-80 (S.D. Miss. 2001) (holding that Texas resident who sent emails advertising pornographic website was subject to personal jurisdiction in Mississippi because emails were received and opened there).

[6] *Parks*, 138 F.Supp.2d at 774.

[7] *Id*.

[8] *Id*.

[9] *Id.* at 776-78.

contacts. [10] It is not necessary, as Defendant appears to suggest, that the claims be inextricably or intimately related with Defendant's contacts; the causative relationship is satisfied, instead, by simply establishing a "but-for" connection between the plaintiff's claims and the defendant's contacts: "[A] cause of action arises from or relates to a defendant's forum contacts when, but for those contacts, the cause of action would never have arisen."[11]

This causal relationship is indubitably satisfied here, as all of Plaintiffs' claims directly arise from Defendant's contact with Yahoo!'s server. Had Virgin not obtained A.C.'s image and entered into a Creative Commons license through Flickr, Plaintiffs would not have suffered the damages that prompted them to file suit; in other words, it was this contact alone that engendered both Plaintiffs' claims and the attendant damages.

Addressing a virtually identical issue, the Southern District of Texas recently applied the "but-for" approach in exercising specific jurisdiction over a Chinese defendant who misappropriated trade secrets from the United States in China:

> While S & D's trade secrets were allegedly misappropriated in China, the first step of the alleged misappropriation—learning the trade secrets—occurred in Texas . . . If they had not obtained the intellectual property in Texas, they would not have been able to misappropriate it. Thus, the alleged misappropriation arose from AAFIS's contact with this state. Accordingly, the Court may exercise specific jurisdiction over AAFIS for both claims asserted against it as long as such an exercise does not offend traditional notions of fair play and substantial justice.[12]

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[10] *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414 (1984); *see also Walk Haydel & Assocs., Inc. v. Coastal Power Production Co.*, 517 F.3d 235, 243 (5th Cir. 2008); *First Fitness Int'l, Inc. v. Thomas*, 533 F. Supp. 2d 651, 656 (N.D. Tex. 2008); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 789 (Tex. 2005); *TravelJungle*, 212 S.W.3d at 846-47.

[11] *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579 (Tex. 2007) (citing *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981)); *see Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990).

[12] *S & D Trading Acad., LLC v. AAFIS, Inc.*, 494 F.Supp.2d 558, 567-68 (S.D. Tex. 2007) (citing *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004)) (holding that personal jurisdiction was proper

As in *S & D*, the first step of the misappropriation in this case occurred in Texas, where Defendant acquired A.P.'s picture from Flickr; if Defendant had not accessed the website, it would not have been able to obtain and subsequently misuse the image for commercial purposes or enter into a Creative Commons license with Justin Wong. As Plaintiffs' claims clearly arise from this contact, it follows that Defendant should be subject to personal jurisdiction in Texas. The fact that it was allegedly unaware that Plaintiffs lived in Texas or that Flickr's servers are located here is inapposite. Responding to this same argument, the court in *TravelJungle* stated:

> As to TravelJungle's contention that it did not know where AA.com's servers were located, we do not believe that it should be able to avoid personal jurisdiction by purposefully engaging in activity directed towards a server located in a particular forum and then claiming ignorance of the location of that forum. In this respect, this case is similar to federal cases holding that senders of spam e-mails are subject to personal jurisdiction in the forum in which their e-mails are received or where the server processing those e-mails is located. . . . *These cases focus, not on the defendant's actual knowledge of the destination of their e-mail activity, but on the deliberate nature of the defendant's activity*.[13]

But unlike in *TravelJungle*, where there was no evidence that the defendant knew or had reason to know where AA's servers were located, Yahoo explicitly informs its users in paragraph seven of its Terms of Service that "[they] will be causing communications to be sent through Yahoo!'s computer networks, portions of which are located in California, Texas, Virginia and other locations in the United States." By using a website that is owned and operated by a United States company to acquire images for its "Are you with us or what" campaign, Defendant, like TravelJungle and senders of spam e-mail, "assumed the risk that [it] would be haled into a forum

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over a nonresident defendant who "came to [the forum state] allegedly to receive the property that they eventually misappropriated and used to injure [the plaintiff]."

[13] *TravelJungle*, 212 S.W.3d at 850 (emphasis added) (citations omitted).

where the server is located."[14] This extension is necessary so that Plaintiffs can ascertain—from Yahoo!'s response to their subpoena—where precisely the server that stored Plaintiffs' image is located.

IV.

CONCLUSION

Plaintiffs, for the reasons set forth above, respectfully request that the Court extend their deadline to respond to Defendant's motion to dismiss to July 24, 2008, a period of 45 days.

Respectfully submitted,

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[14] *TravelJungle*, 212 S.W.3d at 850; *see Ralsky*, 203 F.Supp.2d at 618 ("Defendant's assumed the risk of injuring valuable property in Virginia by deliberately sending millions of UBE [spam e-mails] to and through Verizon's e-mail servers located in Virginia.").

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of May 2008, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the Court's electronic case filing system. The system sent a "Notice of Electronic Filing" to the following attorneys of record, all of whom have consented to accept this Notice as service of the document:

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/s/ Ryan H. Zehl________________________

Ryan H. Zehl